

California Regional Water Quality Control Board
Santa Ana Region

June 1, 2001

ITEM: 19a

SUBJECT: Vila Borba Project, City of Chino Hills

DISCUSSION:

Summary

In late 1999, an application for Clean Water Act Section 401 water quality standards certification was filed with the Regional Board for the proposed Vila Borba project in the City of Chino Hills. The application was submitted on behalf of Mary Parente, the project applicant. Board staff has worked with the applicant and her consultants to obtain additional information concerning this project and to resolve concerns about its potential effects on water quality and beneficial uses. Ms. Parente and her consultants have revised the project to incorporate mitigation that, in staff's judgement, is adequate to address these concerns. However, we have advised the applicant that we cannot proceed with certification of the project until issues related to compliance with the California Environmental Quality Act (CEQA) by the City of Chino Hills, the lead agency, are resolved. CEQA compliance is a prerequisite to 401 certification. The applicant requested that this matter be brought before the Board for consideration of issuance of the 401 certification for the project.

Project Description

The proposed Vila Borba project is a mixed-use residential and commercial development located west of Highway 71 in the City of Chino Hills (Figure 1). Butterfield Ranch Road bisects the 336-acre property and Chino Hills State Park abuts a portion of the west project boundary. Approximately 190 acres of the site would be developed; the remainder of the property would remain open space. Development would occur on four separate tracts: 15696 (Lot 1), 15989 (Lot 5), 15988 (Lot 7) and 15987 (Lots 2,3,4) (Figure 2). Areas outside the development footprint are largely confined to the steeper slopes in the western portion of the property adjacent to Chino Hills State Park and areas within a Southern California Edison power line easement that generally bisects the property along an east-west corridor. The project area has been heavily grazed by cattle and is dominated by a disturbed, non-native grassland community. Riparian vegetation is found within five intermittent drainages on the site. Adjacent land uses include residential housing, grazed open space and undeveloped parkland that is excluded from grazing.

As described in the Clean Water Act Section 404 permit application to the U.S. Army Corps of Engineers for this project, implementation of the project would result in impacts to the five intermittent drainages, which are tributaries to Chino Creek. These drainages are depicted on Figure 2. These tributaries would be filled and/or relocated into underground storm drains, resulting in the loss of approximately 2.49 acres of waters of the United States (totaling 9,565 linear feet), including 1.89 acres of wetlands. Biological surveys conducted in 1999 found that riparian areas on the project site are used by a small number of least Bell's vireos, a federal and state-listed endangered species. No mitigation for the impacts of the project on waters of the United States or the least Bell's vireo was identified in the 404 permit application.

401 Certification

As noted above, an application for Clean Water Act Section 401 certification for this project was submitted to the Regional Board in late 1999. Since that time, Board staff has repeatedly communicated with Ms. Parente's consultants (who have changed over time) both by telephone

and in writing to elicit information needed to proceed with consideration of the certification request. Board staff advised the consultants that mitigation for the losses of wetland and riparian habitat and their beneficial uses must be provided, and staff requested a proposed mitigation plan. Staff also reminded the consultants of the need to assure CEQA compliance and requested submittal of the final, certified CEQA document(s) pertaining to the project. Finally, we advised the consultants that mitigation needed to be provided to address the potential impacts of runoff from the development on water quality and beneficial uses.

The consultants have worked diligently to respond to these concerns. A Draft Conceptual Habitat Mitigation and Monitoring Plan for the project was submitted to the Corps of Engineers in November, 2000 for consideration by interested parties, including Board staff and the U.S. Fish and Wildlife Service, which has jurisdiction pursuant to the federal Endangered Species Act. The mitigation measures specified in the Draft Plan include the creation of a wetland area within the eastern limits of the East Drainage (traverses Lot 1; see Figure 2), restoration and enhancement of riparian areas, and creation of Riversidean sage scrub habitat. Mitigation is proposed in the Draft Plan at a ratio of two acres restored for each acre impacted. All mitigation will occur on site. The Plan also stipulates that "all mitigation areas will be protected in perpetuity through recordation of a conservation easement in the name of a suitable land-management entity...In addition, the Covenant, Codes, and Regulations of the Vila Borba development will stipulate that all mitigation areas be preserved and managed as natural open space in perpetuity". The wetland area within the East Drainage will serve also as a detention basin, providing treatment of runoff from the development.

The U.S. Fish and Wildlife Service has issued a Biological Opinion for this project and concluded that the project, with the mitigation described in the Habitat Mitigation and Monitoring Plan and other conservation measures proposed as part of the project, is not likely to jeopardize the continued existence of endangered species. The Biological Opinion includes an Incidental Take Statement which defines the amount and extent of take of least Bell's vireos and the terms and conditions under which the take is allowed.

Board staff is satisfied that the project, as now proposed, includes adequate mitigation to address our water quality and beneficial use concerns. CEQA compliance, however, is a different matter.

CEQA Issues

As stated previously, Board staff has repeatedly requested the final, certified CEQA document(s) for the project. Again, CEQA compliance is a prerequisite to 401 water quality standards certification.

In response, staff was initially provided with a copy of an Initial Study for the project, dated January 18, 1996 and revised February 12, 1996. As defined in the Initial Study, the Vila Borba Project includes the following applications: General Plan Amendment #001 (to change the site's land use designation from commercial and low density residential to commercial and low density residential, medium density residential and open space); Tentative Tract Map #15710 (to subdivide the site into 7 numbered lots and 1 lettered lot); and Tentative Tract Map # 15696 (to subdivide Parcel 1 of Tentative Tract Map # 15710 of the site into 230 residential lots and 14 lettered lots). The Initial Study stated that, at that time, development was being proposed for only Tentative Tract Map 15696. We note that there is no specific reference in the Initial Study to the other tracts identified in the 404 permit application, i.e. 15989, 15988, and 15987. The Initial Study further indicates that subsequent development proposals for the remainder of the site would require separate review and approval by the City.

The Initial Study was based, in part, on the information and analysis contained in the General Plan Environmental Impact Report (EIR) as certified on September 13, 1994. (Board staff does not have and has not reviewed this document to date.) The Initial Study is also based on an

Environmental Checklist completed for the project, as it is defined above. The conclusion reached in the Initial Study/Environmental Checklist was that "there is no substantial evidence that the proposed project would have a significant effect on the environment with incorporation of the recommended mitigation measures. On the basis of this finding, a Mitigated Negative Declaration is being recommended for adoption."

Board staff requested documentation that the recommended Mitigated Negative Declaration was in fact adopted by the City of Chino Hills. In response, the attorney and consultants for the applicant submitted copies of a resolution (Resolution No. 96R-44) adopted by the City Council on April 23, 1996, approving General Plan Amendment GPA 001 and Zone Change CZ 001. The applicant's attorney asserts that by this resolution, the City adopted the Mitigated Negative Declaration. However, this resolution only makes reference to the adoption by the City Council of a Mitigated Negative Declaration for the project; it is not itself the adopting resolution. Board staff is left with circumstantial, rather than direct evidence that the Mitigated Negative Declaration for the project was indeed approved.

The City of Chino Hills has acknowledged a number of procedural deficiencies in the City's CEQA process for this project. At a May 8, 2001 meeting of the City Council to discuss issues related to the expiration of Tentative Tract Map #15696 (see further discussion below), City staff acknowledged that there is no evidence that public agencies (such as the Regional Board) were given copies of the "Notice of Preparation" of the proposed Mitigated Negative Declaration. The staff report prepared by City staff on this matter indicates that there was public notification via publication in the local newspaper and direct mailings to the surrounding property owners. City staff indicated that while a Notice of Determination had been prepared (signifying the adoption of a final CEQA document), it had not been sent to the County or the State Clearinghouse, as required. (Board staff has not been provided with a copy of this Notice of Determination pursuant to our repeated requests for documents related to CEQA compliance.)

Despite various arguments put forth by attorneys for the applicant, it is clear that the Regional Board has significant CEQA problems facing it. Unless the City takes further action to carry out its CEQA responsibilities (a distinct possibility in light of the Map problems), it appears that it may be necessary for the Regional Board to assume the role of lead agency and to prepare a replacement or supplemental CEQA document. You will receive from Board Counsel, Ted Cobb, a more complete explanation of the alternatives presented to you along with some discussion of the consequences of each.

The only clear and simple way for the Regional Board to avoid lead agency role in the CEQA process is for the City to assume that role once again. It appears that the dispute over the Map may provide such an opportunity. Under the Government Code, a Map is approved for a specified period of time. The life of the Map may be extended by the approving authority or the life may be deemed to have been extended if something in the nature of a building moratorium interfered with the ability to go forward with the project.

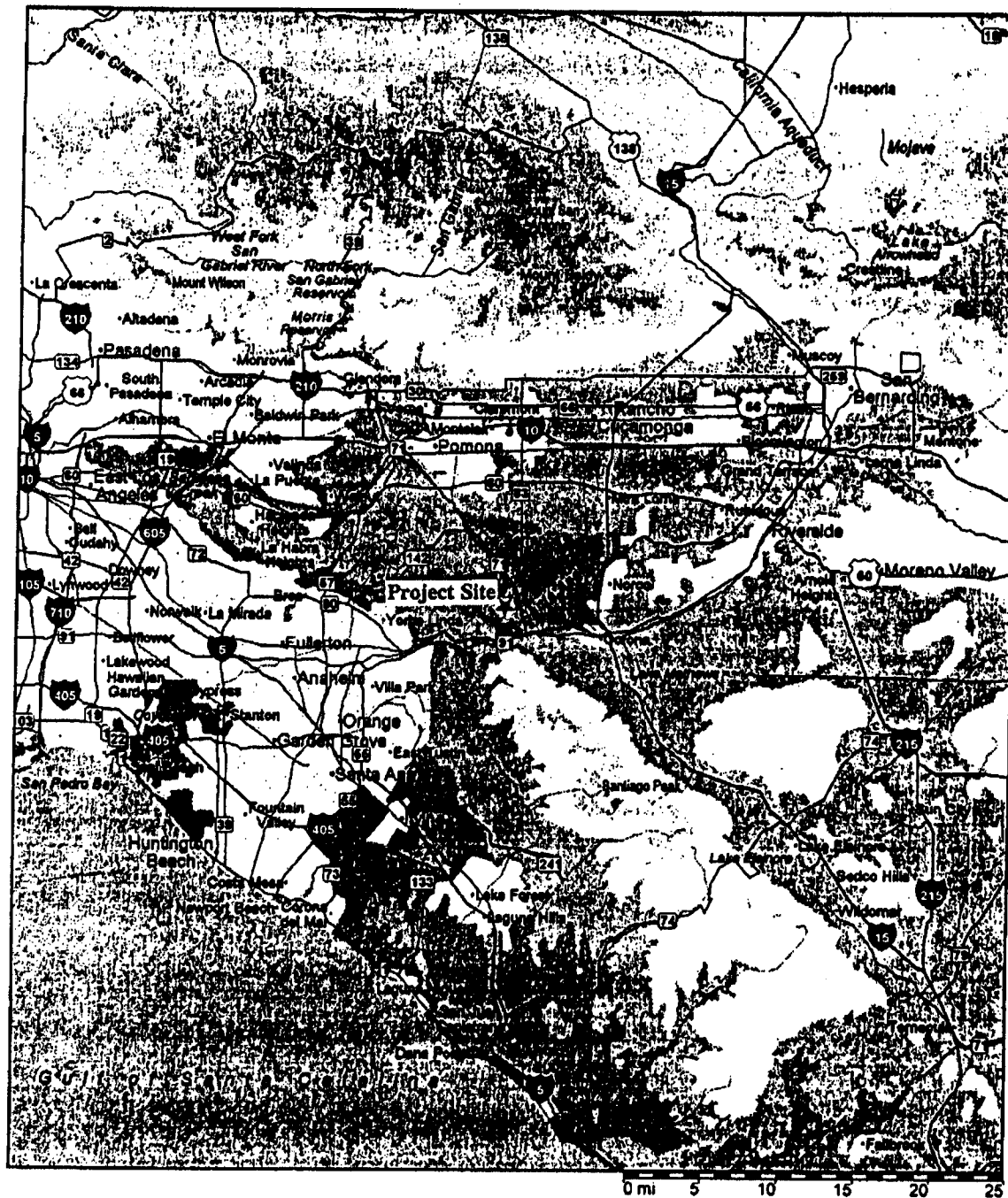
The applicant has already asked the City to recognize that delays in the 404/401 process constituted a moratorium. The City Council met on May 8, 2001 to discuss that and other issues related to the expiration of Tentative Tract Map # 15696. As reported by City staff, the City approved this Tract Map on April 23, 1996. It expired on April 23, 1999 but was extended for one year to due a provision of the Government Code. The Tract Map was then set to expire on April 23, 2000. Ms. Parente applied for an extension on March 23, 2000. A hearing on the extension was not scheduled pending resolution of an assertion by the applicant that a development moratorium was in effect, and, if so, its duration. The City Council determined on May 8, 2001 that no moratorium was in effect. The issue of the extension is tentatively set to come before the council on June 12, 2001. . If the City turns down the request, the Map will have expired and a new process must begin from scratch if the project is to be built. This would clearly involve a new CEQA document. If the extension is granted, it is the position of the attorneys representing a

citizens group opposed to the extension that a supplemental CEQA document would also be required as the extension arguably has significant environmental consequences. It is not known whether attorneys for the City agree with this position.

RECOMMENDATION:

Staff placed this item on the Board's agenda on May 22nd after representatives of the project applicant inquired whether the project could be added to the agenda at that late date. Staff added this matter to the agenda because of repeated requests for staff issuance of the 401 Water Quality Certification by representatives of the applicant. As discussed above, staff was unable to grant 401 Water Quality Certification because of unresolved CEQA issues.

Notice to other interested parties concerning the placement of this matter on the Board's agenda was also circulated on May 22nd, and this staff report was circulated on May 25th, one week before the Board meeting. Given this limited time and opportunity for comment by other interested parties, given the need to attempt to resolve legal issues pertaining to CEQA compliance, and given the possibility of action by the Chino Hills City Council on June 12th, Board staff cannot recommend that the Board take action at this time. Representatives of the applicant have indicated that legal arguments and documents will be produced that should resolve these issues. Should these arguments and documents demonstrate CEQA compliance, 401 Water Quality Certification can be issued by staff, and it would be unnecessary to bring this matter back to the Board. Therefore, staff recommends that this matter be brought back to the Board for consideration at your July 20, 2001 meeting, if necessary.

**FIGURE 1**

Vicinity Map
 Vila Borba Project
 Chino Hills, San Bernardino County, California

Source: Microsoft Automap Streets Plus, 1997 edition

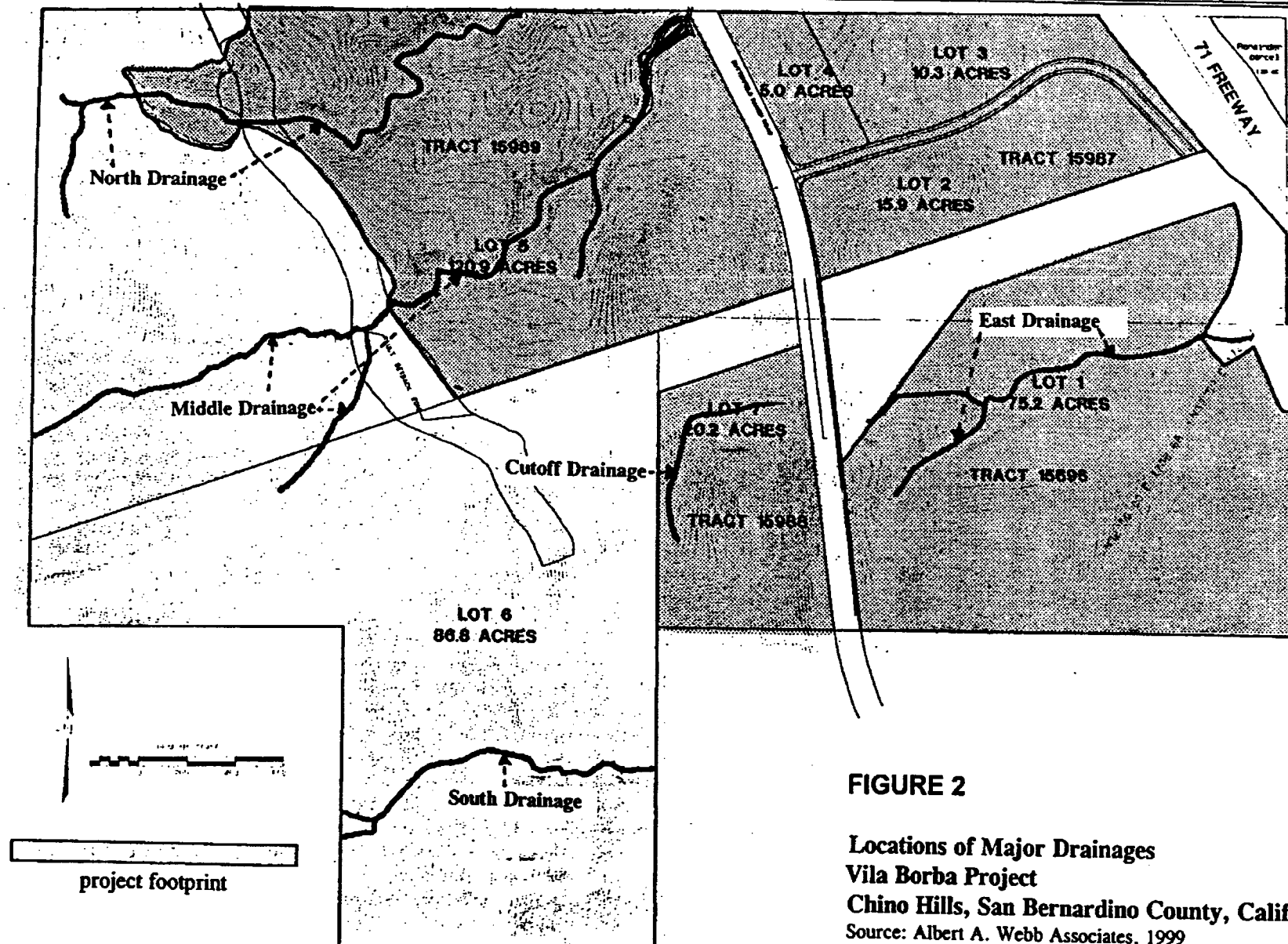


FIGURE 2

Locations of Major Drainages
Vila Borba Project
Chino Hills, San Bernardino County, California
 Source: Albert A. Webb Associates, 1999





Winston H. Hickox
*Secretary for
Environmental
Protection*

State Water Resources Control Board

Office of Chief Counsel

1001 I Street, 22nd Floor, Sacramento, California 95814
P.O. Box 100, Sacramento, California 95812-0100
(916) 341-5161 ♦ FAX (916) 341-5199 ♦ www.swrcb.ca.gov



Gray Davis
Governor

*The energy challenge facing California is real. Every Californian needs to take immediate action to reduce energy consumption.
For a list of simple ways you can reduce demand and cut your energy costs, see our website at www.swrcb.ca.gov.*

TO: Jerry Thibeault
Executive Officer

Santa Ana RWQCB Members

/s/

FROM: Ted Cobb
Assistant Chief Counsel
OFFICE OF CHIEF COUNSEL

DATE: May 29, 2001

SUBJECT: CEQA ISSUES: VILA BORBA PROJECT

This memo concerns problems currently faced by the Regional Board in complying with its obligations under the Clean Water Act and the California Environmental Quality Act. Because the Regional Board is required to fulfill certain statutory and regulatory requirements, it does not have much discretion and must address certain matters, as I discuss below.

The developers of the Vila Borba Project have approached the Regional Board to obtain certification under section 401 of the Clean Water Act. That section requires that, when a federal agency proposes to approve various projects under the Clean Water Act, a state concur that it is satisfied that the project will not adversely affect the waters of the state. In this case, the developers have applied to the Army Corps of Engineers for a permit pursuant to section 404 of the Act. The Corps has forwarded the matter to the Regional Board for its concurrence under section 401. In order to issue a concurrence, the Regional Board must satisfy all of the requirements set forth in State Board regulations. (Cal. Code of Regs., tit. 23, §§ 3855 et seq.)

Three problems regarding CEQA compliance have been called to the attention of Regional Board staff. All appear to be valid concerns. First, the negative declaration done by the City of Chino Hills may be inadequate, as a matter of law. The environmental checklist appears to ignore several obvious problems and the suggested mitigation is questionable. Second, the City appears not to have consulted with the Regional Board. Staff can find no record of any communication from the City regarding this issue, and the City has been unable to produce any such record. The City staff stated at a recent City Council meeting that they did not submit the document to the statewide CEQA clearinghouse and did not consult with Fish and Game. It seems likely that they did not consult with the Regional Board either. Third, after the approval of the negative declaration, additional wetlands and an endangered bird species were found on

the site. It appears that these conditions occurred after approval and not that they were simply missed.

CEQA regulations set forth the circumstances in which a responsible agency, such as the Regional Board in this case, must assume the lead agency role and fulfill all necessary obligations for preparation of an environmental document. In California Code of Regulations, title 23, section 15052, the regulations discuss the "shift in lead agency designation."

- (a) Where a responsible agency is called on to grant an approval for a project subject to CEQA for which another public agency was the appropriate lead agency, the responsible agency shall assume the role of the lead agency when any of the following conditions occur:
 - (1) The lead agency did not prepare any environmental documents for the project, and the statute of limitations has expired for a challenge to the action of the appropriate lead agency.
 - (2) The lead agency prepared environmental documents for the project, but the following conditions occur:
 - (A) A subsequent EIR is required pursuant to Section 15162,
 - (B) The lead agency has granted a final approval for the project, and
 - (C) The statute of limitations for challenging the lead agency's action under CEQA has expired.
 - (3) The lead agency prepared inadequate environmental documents without consulting with the responsible agency as required by Sections 15072 or 15082, and the statute of limitations has expired for a challenge to the action of the appropriate lead agency.
- (b) When a responsible agency assumes the duties of a lead agency under this section, the time limits applicable to a lead agency shall apply to the actions of the agency assuming the lead agency duties.

For present purposes, subsections (a)(2) and (a)(3) are applicable. If, as staff believes, the negative declaration approved by the City was inadequate and if, as the evidence certainly indicates, it was not properly circulated, and inasmuch as the Regional Board is now being called upon to grant approval of the project, the regulation requires that the Regional Board "shall assume the role of lead agency." This would mean that the Regional Board would become

responsible for the preparation and circulation of an adequate environmental document, presumably an environmental impact report.

If, for some reason, that requirement is not applicable, there is the second problem. It seems certain that the least Bell's vireo has taken up residence on the site and that the character of the riparian habitat has changed since the approval of the negative declaration. These changes are covered under subsection (a)(2). The section referred to, section 15162 of the CEQA guidelines, states in relevant part:

- (a) When an EIR has been certified or a negative declaration adopted for a project, no subsequent EIR shall be prepared for that project unless the lead agency determines, on the basis of substantial evidence in the light of the whole record, one or more of the following: [¶] . . . [¶]
- (2) Substantial changes occur with respect to the circumstances under which the project is undertaken which will require major revisions of the previous EIR or negative declaration due to the involvement of new significant environmental effects or a substantial increase in the severity of previously identified significant effects; [¶] . . . [¶]
- (c) Once a project has been approved, the lead agency's role in project approval is completed, unless further discretionary approval on that project is required. Information appearing after an approval does not require reopening of that approval. If after the project is approved, any of the conditions described in subsection (a) occurs, a subsequent EIR or negative declaration shall only be prepared by the public agency which grants the next discretionary approval for the project, if any. In this situation no other responsible agency shall grant an approval for the project until the subsequent EIR has been certified or subsequent negative declaration adopted.
- (d) A subsequent EIR or subsequent negative declaration shall be given the same notice and public review as required under Section 15087 or Section 15072. A subsequent EIR or negative declaration shall state where the previous document is available and can be reviewed.

The biggest difference between being required to take over the lead agency role under subsection (a)(2) versus (a)(3) is that under the latter, a full environmental review would be required whereas under the former the document could be focused on the issues that required the case to be reopened. In either event, the presence of the endangered species on the site almost assures that an environmental impact report would be required instead of a negative declaration. (Cal. Code of Regs., tit. 14, § 15065.)

The use of the word “shall” is the problem. Unless the Regional Board can make a good faith finding, supported by evidence in the record, that the key elements of subsections (a)(2) and/or (a)(3) of section 15052 are not present, the Regional Board has little discretion. Only if another agency moves in and takes over the CEQA compliance duties or if the Regional Board finds that no additional CEQA compliance is necessary to allow it to issue the 401 certification, would there be some way to avoid the obligation. Fortunately, it appears that the City of Chino Hills may do just what is needed. Because of the ongoing dispute over the extension or nonextension of the tentative Map, it appears more than likely that the City will have to do further CEQA documentation. If that happens, the Regional Board would assume its usual role as responsible agency under CEQA.

Jerry Thibeault

- 5 -

May 29, 2001

bc:

TACobb/dlheryford

05-29-01

i:\heryd\2-tac\ceqa issues-vila borba project--tac to jerry thibeault.doc